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No. ___

In the

Supreme Court of the United States

October Term, 1982

Union National Bank of Little Rock ..... *Petitioner*

V.

Melvin Paxton, et al. ..... *Respondents*

AMICI CURIAE
BRIEF IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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*INTEREST OF AMICI CURIAE**

The Arkansas State Chamber of Commerce (ASCC) and Associated Industries of Arkansas, Inc. (AIA) fully adopt the arguments and views advanced by Petitioner, Union National Bank. This *amicus* brief, supplemental by design, confines its argument to those legal principles implicit within the Eighth Circuit panel's opinion that have general applicability to all employers.

The ASCC represents the 1,421 companies comprising its membership in matters of concern to the business community. The AIA performs the same function for 626 companies that make up its membership.

*The parties' letters of consent to the filing of this brief were filed with the Clerk by letter of counsel for amici curiae dated January 21, 1983.

These organizations and their members are gravely concerned about the impact of the panel's decision in this matter as legal precedent for all employers. They are particularly alarmed by the panel's holding governing the determination of the pool of qualified individuals in the relevant labor market for promotions and the burden of proof relative to that determination. They are further concerned about the panel's failure to require accepted tests for statistical significance in determining the evidentiary value of numerical disparities. They are also apprehensive about the panel's seeming disregard of the existence of an aggressive affirmative action plan in determining whether there was intentional discrimination. Finally, they are greatly disturbed by the panel's apparent willingness to grant what was in effect a trial *de novo* at the appellate level particularly since the panel seemed more concerned with erroneous findings of fact than with erroneous conclusions of law.

As will be developed below, it is the position of the ASCC and AIA that these issues are of extraordinary concern to their members and the business community at large and that the panel's rulings are in substantial contravention of the established legal precedent in those areas of the law. Therefore, it is submitted that Certiorari should be granted and the panel's decision reversed for the reasons stated below.

ARGUMENT

I. *THIS IS A DISPARATE TREATMENT CASE*

The trial court and the Eighth Circuit panel herein properly characterized this action as a disparate treatment case. Essentially, disparate treatment analysis is designed to provide redress for minority employees who are treated differently than similarly situated white employees. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Disparate impact analysis, on the other hand, is specifically designed to provide a remedy under the Act for minority employees adversely affected by an employer's across-the-board application of practices, procedures or tests, neutral on their face or even neutral in terms of intent, that operate to perpetuate the effects of past discrimination. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971). In a disparate impact case the plaintiff has the initial burden of proving that the defendant's facially neutral policy or practice has a substantial impact upon members of a protected class. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) and *McCosh v. City of Grand Forks*, 628 F.2d 1058, 1061-62 (8th Cir. 1980). The unstated, yet implicit, assumption here is that the plaintiff must first specifically identify the facially neutral policy at issue. The Eighth Circuit recently affirmed this imminently logical precept in *Harris v. Ford Motor Co.*, 651 F.2d 609, 611 (8th Cir. 1981). "To establish a *prima facie* case under the *Griggs* theory of disparate impact, an employee must, *as a threshold matter*, point to a facially neutral employment practice or criteria

that operates in a discriminatory manner." *Id.*, (emphasis added) [1]

The language of *Harris* is clear and unambiguous. The writers of this *amicus* brief were, therefore, surprised and somewhat dismayed by the following statement:

> An argument can be made that the promotion class claims should have been decided under the disparate impact theory. As we detail, *infra*, the plaintiffs proved that the racial composition of the bank's workforce at most above-entry levels does not reflect the composition of available qualified persons in the relevant labor pool. The court could have concluded from this that the sum of the defendant's promotion methods, although not administered with a discriminatory intent, impacted more heavily on blacks in the bank's workforce. The bank would have then had to show that the disparate results were attributable to identifiable, neutral personnel practices that were necessary to its business.

Paxton v. Union National Bank, Nos. 81-1650, 81-1656, and 81-1657 (8th Cir. Slip. Op., September 10, 1982) at 4n. 3, hereinafter cited as "O. at ____." (citations omitted) The most objectionable aspect of this statement is that it wreaks havoc

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[1]Other Circuit Courts of Appeal have also adopted this seemingly self-evident, yet apparently controversial, precept. See, e.g., *Mortensen v. Callaway*, 672 F.2d, 822, 824 (10th Cir. 1982), "Mortensen also claims she proved a *prima facie* case of disparate impact. To do so, she needed to show that the Army utilized employment practices that, while facially neutral in their treatment of different groups, had a discriminatory effect or impact on a particular group. But while Mortensen introduced statistics showing a lack of women supervisors . . . , she has not pointed to any employment practice that, neutral on its face, has caused women not to be promoted to supervisory positions." (citations omitted); *Heagney v. University of Washington*, 642 F.2d 1157, 1163 (9th Cir. 1981), "Once plaintiffs have shown the *existence* and impact of such a practice, which constitutes a *prima facie* case, the employer will be held liable unless the practice can be justified by 'business necessity'. " (emphasis added); and, *Pouncy v. Prudential Insurance Co. of America*, 668 F.2d 795, 800 (5th Cir. 1982), "A *prima facie* case is shown by *identification* of a neutral employment practice coupled with proof of its discriminatory impact on the employer's workforce." (Emphasis added)

with the standards and burdens of proof already prescribed by this Court. In essence, the Eighth Circuit panel indicates that a Title VII or §1981 defendant must assist the plaintiff by indentifying the facially neutral practice[s] impacting upon a protected minority. The burden is completely reversed. This is totally illogical and certainly contrary to the spirit if not the letter of this Court's holdings in *Griggs*, *Albemarle*, and *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977). For example, it would be patently illogical to assume that this Court would mandate "business necessity" as the exclusive defense, *Albemarle, supra*, 422 U.S. at 430-36, unless it intended for a defendant to receive complete and timely notice of the practice at issue. Certainly a defendant must be aware of the challenged practice before he can validate it, see e.g., *Pouncy v. Prudential Ins. Co. of America*, 668 F.2d 795, 801 (5th Cir. 1982).

The second objectionable aspect of the above-quoted statement is that it obliquely sanctions the use of disparate impact analysis when a plaintiff has attacked only the "sum" or cumulative effect of a company's employment practices. In essence, the panel says that a disparate impact analysis is appropriate even when a plaintiff has proven nothing more than the simple fact that an employer has a higher percentage of blacks at the lower levels of the workforce than at the higher levels. This is clearly antithetical to the prior teachings of this Court, see e.g., *Green v. McDonnell Douglas Corp.*, 463 F.2d 337, 352 (8th Cir. 1972) *then McDonnell Douglas, supra*, 411 U.S. at 805-06. In that instance this Court pointed out that the Eighth Circuit's reliance on *Griggs* was misplaced and that disparate impact analysis is properly limited to objective, mechanically-applied employment devices. Other Circuit Courts of Appeal have recognized that the cumulative effects of a company's employment practices are not properly analyzed under the disparate impact model of discrimination. *Pouncy, supra*, 668 F.2d at 800-801; *Heagney v. University of Washington*, 642 F.2d 1157, 1163 (9th Cir. 1981); and, *Pope v. City of Hickory, North Carolina*, 679 F.2d 20, 22 (4th Cir. 1982). Indeed, even the Eighth Circuit paid lip service to this concept in *Harris, supra*. In that case a different panel than the one

herein said that subjective evaluation and decision-making systems are not the types of practices banned by *Griggs* and cannot form the basis of a disparate impact claim. Even the Equal Employment Opportunity Commission appears to have fallen into line. In Appeal No. 01811187, dated May 21, 1982, the Commission affirmed a final agency decision which clearly stated that subjective evaluation criteria, manifested through an underrepresentation of blacks in one area of an employer's workforce, do *not* give rise to a claim of disparate impact. In summary, the claims raised herein were properly considered under the disparate treatment model. This Court should take its first opportunity to delineate, once and for all, the appropriate scope of disparate impact analysis.

The writers of this brief are all too well aware of the fact that, inasmuch as the case was *ostensibly* analyzed under the disparate treatment model, this question may not be properly before the Court. Nevertheless, we submit that this misconception as to the proper scope of disparate impact analysis *is* important. The panel seems to assume that there is no difference between disparate impact and disparate treatment. Such a misconception cannot help but taint the panel's consideration of evidentiary matters. It is especially disastrous here because the panel engaged in an exhaustive reevaluation of the basic facts of the case while, at the same time, cited little or no case authority supportive of its analysis thereof.

II. *THE EIGHTH CIRCUIT PANEL COMPLETELY IGNORED PROBATIVE AND COMPELLING EVIDENCE OF THE ABSENCE OF DISCRIMINATORY INTENT*

The trial court and the appellate panel (at least tacitly) analyzed plaintiff's claims under the *McDonnell Douglas* disparate treatment theory. It is well established that, in order

to prevail under this theory, a plaintiff must prove that the employer *intentionally* engaged in prohibited discrimination [2]. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977); *Taylor v. Teletype Corp.*, 648 F.2d 1129, 1133 n. 7 (8th Cir.), *cert. denied*, 454 U.S. 969 (1981).

Proof of discriminatory purpose, i.e., intent, is pivotal in establishing a disparate treatment claim. *Id.* Despite the critical nature of such proof, the appellant panel completely ignored the implications of the bank's affirmative action plan relative to the issue of discriminatory purpose. The district court credited the bank with *voluntarily* implementing an *aggressive* affirmative action program in the early 1970's, *Paxton v. Union National Bank*, 519 F. Supp. 136, 144 (E.D. Ark. 1981), and the panel stated that "the bank must be given credit" for the adoption of this program. O. at 20-21. The rest of the appellate panel's opinion, however, shows little or no evidence that such "credit" was actually extended. Indeed, despite the existence of this affirmative action plan, the panel takes every available opportunity to *assume* that Union National Bank was harboring an invidious racial animus. Such an assumption is unwarranted when one considers the length and breadth of the bank's affirmative action efforts.

Certainly, the existence of an affirmative action program under which the bank aggressively sought to hire blacks, even to the extent of developing a special program to train blacks for banking positions, 519 F. Supp. at 145, has a direct bearing on the presence of any intent to discriminate against blacks in promotions. It makes little sense for an employer to engage in such aggressive and

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[2] That this requirement is logical and necessary becomes obvious when one remembers that the whole purpose behind the disparate treatment model of discrimination is to provide redress for minority employees who are, because of their race, color, religion, sex or national origin, treated differently than similarly situated white employees. *Teamsters, supra*, 431 U.S. at 335 n. 15. Intent is an obvious and integral element of this type of discrimination.

wholly voluntary affirmative action efforts as those described by the district court, 519 F. Supp. at 144-45, while simultaneously harboring the intent to individiously discriminate against the persons so ardently recruited.

The writers of this *amicus* brief are concerned with the practical effects of the Eighth Circuit's treatment of this issue. The casual (seemingly offhanded) manner in which the panel dismissed the bank's affirmative action efforts could possibly have disastrous long-range consequences. In practical terms the message sent to employers and their attorneys can be aptly summarized as follows: One need not bother with the effort and expense of an affirmative action program because, in the final analysis, it is of little or no value in protecting one from liability. [3] Instead of a shield for the defense, it becomes a sword for the Plaintiff.

Surely that message is not one this Court wishes to be widely disseminated. Certiorari should be granted if for no other reason than to address this issue alone.

III. *THE EIGHTH CIRCUIT PANEL BASED ITS FINDING OF DISCRIMINATION IN THE AREA OF PROMOTIONS SOLELY UPON RAW, WHOLE-UNIVERSE DATA COMPLETELY BEREFT OF STATISTICAL SIGNIFICANCE.*

If this were an ideal world wherein all people had the same abilities and interests as well as identical education and experience, then, perhaps, simple descriptive statistics would be

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[3] The employer's dilemma is exacerbated by the fact that implementation of an affirmative action program will, as it did for Union National Bank, at least initially, create a significant influx of blacks and other minorities into the lower levels of the workforce. Only a fool would implement such a program if, as the Eighth Circuit panel herein seems to indicate, O. at 22, liability can be predicated solely upon the simple fact that there are more blacks in the lower levels of the workforce than in the higher levels. See, Section III below.

sufficient to prove discrimination. In such a world the mere fact that an employer has X percentage of blacks in the workforce, Y number of white supervisors and Z number of black supervisors might be sufficient to demonstrate bias in the selection process because everyone would have identical qualifications. Such an environment, however, does not and cannot exist. People do differ and those differences must be considered when reviewing employment decisions for the presence of prohibited discrimination. Indeed, to gauge the presence or absence of discrimination solely on the basis of such a simplistic analysis would clearly contravene the express provisions of Title VII, *see*, 42 U.S.C. §2000e-2(j).

Consequently, this Court has held that such an observed discrepancy, in order to be meaningful, must be statistically significant. To be statistically significant the discrepancy must be outside the range of variation which could, in the normal course of events, be attributed to random chance. This Court has even gone so far as to clearly define the acceptable range of variation, holding that discrimination can be inferred, " . . . if the difference between the expected value and the observed number is greater than two or three standard deviations, . . . " *Hazelwood School District v. United States*, 433 U.S. 299, 309 n. 14 (1977) *quoting Castaneda v. Partida*, 430 U.S. 482, 497 n. 17 (1977). Clearly implied is the fact that an observed difference cannot support an inference of discrimination if it is less than two or three standard deviations from the expected norm. Indeed, even the Eighth Circuit appeared to accept this logical extension of *Hazelwood* when it said that, "[n]umbers *must be* statistically significant before one can properly conclude that any apparent racial disparity results from some factor other than chance." *Taylor v. Teletype Corp.*, 648 F.2d 1129, 1133 (8th Cir.), *cert. denied*, 454 U.S. 969 (1981) (emphasis added); accord, *Hameed v. International Ass'n of Bridge, Struc. & Ornamental Iron Workers, Local 396*, 637 F.2d 506, 513 (8th Cir. 1980); and, *Movement for Opportunity & Equality v. General Motors Corp.*, 622 F.2d 1235, 1259 (7th Cir. 1980).

Despite this persuasive and controlling precedent, the Eighth Circuit panel herein failed to apply any test of statistical

significance. To the contrary, it concluded that simple descriptive statistics, i.e., comparisons of raw numbers and simple percentages, were sufficient to establish class-wide discrimination on the basis of race in the area of promotions. O. at 23-25. It is interesting to note that the Eighth Circuit previously rejected such raw data as unmeaningful when faced with the exact same question in another action.

> The district court merely stated the actual number and percentage of black foremen for the three years in question and the number and percentage of black cement finishers on the First National Bank job during that period. To infer a prima facie case of discrimination from these numbers and percentages, the court needed to go beyond presentation of the raw data to application of an appropriate and recognized test for determining the statistical significance of any observed disparity. *See Mayor v. Educational Equality League*, 415 U.S. 605, 619-20, 94 S.Ct. 1323, 1332-1333, 39 L.Ed.2d 630 (1974) (rejecting as unreliable "simplistic percentage of comparisons" of the racial composition of a thirteen-member nominating panel and the population of Philadelphia).

Eubanks v. Pickens-Bond Const. Co., 635 F.2d 1341, 1349-50 (8th Cir. 1980).

That the panel neglected to make any determination of statistical significance is particularly disturbing when one notes that it completely ignored a credible analysis by the bank's expert showing no statistically significant disparity in promotions. The trial court placed special emphasis on it, 519 F. Supp. at 153, but the appellate court opinion makes no mention whatsoever of the analysis.

This case would provide the Court an excellent podium from which to underscore the importance of statistical significance in Title VII analysis. We respectfully request that Certiorari be granted for this purpose.

IV. *THE RELEVANT LABOR MARKET FOR A PROMOTIONS CASE IS NOT "ALL EMPLOYEES."*

Certainly it is axiomatic that statistical disparities, in order to be meaningful in the Title VII context, must compare the racial and demographic characteristics of those groups of persons actually impacted by the employment practice or system at issue. This Court has, consequently, held that a statistical disparity, to be probative, must offer a comparison of those actually employed to the pool of qualified applicants in the relevant labor market. *Hazelwood, supra*, 433 U.S. at 308. The Eighth Circuit panel herein violated this fundamental concept when it held that the pool of qualified applicants for promotions at Union National Bank was comprised of all "employees currently employed in the bank." O. at 22. The panel went on to base its finding of discrimination on a "substantial disparity between black employees available within the bank and the proportions actually promoted." O. at 25. In essence, the panel based its conclusion that the bank's selection process was purposefully discriminatory solely upon the fact that it has a higher percentage of blacks in the lower levels of the workforce than in the higher levels. This approach was and is inappropriate for several reasons.

First, in this particular case, it was based upon an incorrect factual predicate. The panel chose "all employees" as the appropriate pool because "[t]he bank's stated policy was and is to promote from within . . . " O. at 22. This statement fails to come to grips with two crucial facts: (1) The bank's Personnel Policy Manual, quoted extensively in the panel's opinion, says that "[t]he Bank policy on filling openings is to do so from within *where possible.*" O. at 22. (emphasis added); and, (2) it is uncontroverted that about twenty-five percent (25%) of the bank's above-entry level positions and approximately fifty percent (50%) of its highest level managerial and technical positions are filled from outside the current workforce. O. at 23. For the panel's

analysis to be scientifically valid, they should have defined the relevant labor market in this case as a weighted average between current employees and the general populations possessing the necessary qualifications.

Second, the panel's approach was inappropriate because it was based upon insufficient legal precedent. It cited three (3) cases, *Mayor of the City of Philadelphia v. Educational Equality League*, 415 U.S. 605, 620-621 (1974); *Rivera v. City of Wichita Falls*,665 F.2d 531, 541 n. 16 (5th Cir. 1982), and *Fisher v. Proctor & Gamble Mfg. Co.*, 613 F.2d 527, 543-544 (5th Cir. 1980), *cert. denied*, 449 U.S. 1115 (1981), for the proposition that comparison of the various levels of the bank's workforce with "general population statistics" was error. O. at 23. The panel's reliance is misplaced. *Mayor v. Educational Equality League* does, indeed, reject as unreliable "simplistic percentage comparisons" of the racial composition of a nominating panel and the population of Philadelphia. By no stretch of the imagination, however, does it even remotely reflect upon the viability of a scientifically conducted statistical comparison of the different levels of a Title VII defendant's workforce and the general population of the relevant labor market with the requisite skills to do the job.

The panel's use of *Fisher* is even more puzzling. In that case the Fifth Circuit clearly endorsed comparisons with general population figures to establish "compelling underrepresentation." 613 F.2d at 544. True enough, it did sanction comparisons between racial make-up in selected positions and the racial composition of the total workforce *in some cases*. However, it expressly limited such comparisons to instances wherein " . . . a company adopts a policy and practice of hiring in at low level unskilled jobs and promoting to upper-level positions based upon training received and skills developed at the plant itself . . ." 613 F.2d at 544. Obviously, even under the express language of *Fisher*, such a comparison is inappropriate in this case because Union National Bank does, in fact, fill a significant number of vacancies from outside its workforce.

The Fifth Circuit did precisely the same thing in *Rivera*. Footnote number 16 cited by the appellate panel, did, indeed, sanction the occasional use of internal comparisons. The rest of the note, however, contains the following disclaimer:

> [i]t is necessary to show not only a compelling level of comparative underrepresentation, but *also* a policy of filling upper level positions through promotion of employees hired at entry-level and trained by the company in the requisite skills.

665 F.2d at 541 n. 16. (emphasis added) Obviously, these three cases provide little or no support for the panel's radical position.

The third, and most important, objection to the panel's approach is that it incorrectly assumes that *all* employees are equally qualified for and desirous of *all* jobs. In *Rivera* the court recognized the fallacy of this assumption.

> The *Hazelwood* rule requires that the relevant labor pool be tailored to eliminate those whose exclusion from the positions in issue could be attributed to want of the requisite skills.

665 F.2d at 540.

> Proof of a policy favoring promotion does not, however, automatically invoke this "internal comparison" variant of labor pool definition. Plaintiffs seeking to use this approach are, no less than those applying external comparison methodologies, required by *Hazelwood* to identify those segments of the existing workforce qualified, by reason of training or experience, to assume the higher level positions at issue. In other words, the percentage of minority workers in all lower level positions combined will not, without more, be considered to be the relevant labor market from which upper level positions would be filled. Rather, the lower level positions must be differentiated by degree of ability in order to identify those which are the resource from which promotions to the positions in issue would be made.

655 F.2d at 541. Accord, *Hill v. Western Electric Co., Inc.*, 596 F.2d 99, 103-105 (4th Cir.), *cert. denied*, 444 U.S. 929 (1979). (The labor pool from which supervisors are drawn consists only of those lower level employees with adequate education, experience and ability to perform supervisory jobs.); *Pouncy, supra*, 668 F.2d at 803; *Ste. Marie v. Eastern R.R. Ass'n*, 650 F.2d 395, 400-401 (2nd Cir. 1981); and *Wilkins v. University of Houston*, 654 F.2d 388, 401 (5th Cir. 1981).

With regard to this issue it is important to keep one additional fact in mind. The plaintiff has the burden of establishing the proper definition of the pool of qualified applicants as a necessary element of his *prima facie* case. *Eubanks, supra; Hebert v. Monsanto Co.*, 682 F.2d 1111, 1126 (5th Cir. 1982); and, *Movement for Opportunity & Equality v. General Motors Corp.*, 622 F.2d 1235, 1258 (7th Cir. 1980, "If an improper pool was utilized the statistics have no value and fail to establish a prima facie case." Plaintiffs herein dismally failed to shoulder this burden.

Certiorari should be granted if for no reason other than to specifically define the circumstances in which an internal comparison is appropriate.

V. *EVEN IF AN INTERNAL COMPARISON WERE APPROPRIATE, THE EIGHTH CIRCUIT PANEL'S ANALYSIS WAS INADEQUATE.*

Even if this Court determines that an internal comparison was appropriate, the Eighth Circuit panel's decision is still clearly unsupportable. Receipt of 11% of all promotions, O. at 24, while comprising only 16.7% of the total workforce, 519 F.Supp. at 148, can hardly be said to constitute a "compelling underrepresentation." Please note, also, that the panel ignored undisputed evidence submitted by the bank which clearly demonstrated the absence of a legally cognizable disparity when the racial composition of *all* employees was compared to the racial composition of *all* those receiving promotions for each

year from 1974 through 1980. Defendant's Exhibit 34(a). This oversight is particularly egregious since this exhibit was specifically adopted by the district court as a finding of fact and served as part of the evidentiary basis for its finding of no discrimination. 519 F.Supp. at 153.

VI. *THE EIGHTH CIRCUIT PANEL SUBSTITUTED ITS OWN INTERPRETATION OF THE RECORD FOR THE TRIAL COURT'S FINDINGS OF FACT IN VIOLATION OF THE CLEARLY ERRONEOUS RULE*

Rule 52(a) of the Federal Rules of Civil Procedure says in pertinent part that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Considerations of judicial economy and effectiveness underlying this rule have long since prompted this Court to hold that the function of an appellate court is "not to decide factual issues *de novo*," *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 123 (1969), and that, where the evidence can support two conflicting views, it is not clear error for the trial court to decide in favor of one view over the other. *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949). [4]

The Eighth Circuit has taken the next logical step. In *St. Louis Typographical Society Union No. 8 v. Herald Co.*, 402 F.2d 553, 557 (8th Cir. 1968) it held that, in an instance wherein the evidence is supportive of more than one position, the clear commands of Rule 52(a) are not voided merely because the appellant court would have decided the case differently. And in *Pickens-Bond Const. Co. v. United Brotherhood of Carpenters*

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[4]This is, essentially, the situation in the case at bar. It was a long (6,000 page transcript), complicated and hotly-contested lawsuit. An avid advocate for either party can search the record and find *some* evidence supportive of his position. Nevertheless, the trial judge made extensive and detailed findings of fact for which there is certainly substantial evidentiary support. That it might be possible to reach a contrary conclusion, if one were inclined to do so, is not sufficient to avoid the clear commands of Rule 52(a).

and Joiners, Local 690, 586 F.2d 1234 (8th Cir. 1978) the circuit established the practical standard against which findings of fact are to be measured.

> Findings of fact by a trial court sitting without a jury are presumed correct and cannot be set aside unless clearly against the weight of the evidence when viewed in the light most favorable to the prevailing party. *Anderson v. Federal Cartridge Corp.*, 156 F.2d 681 (8th Cir. 1946); Fed.R.Civ.P. 52 (a).

Id. 586 F.2d at 1239.

The Eighth Circuit panel herein completely ignored the dictates of *Hazeltine* and *Yellow Cab* and, in point of fact, imposed a much more rigorous standard of review than that defined in *Pickens-Bond*. With regard to the issue of class-wide discrimination in the area of promotions the panel engaged in a pointed and extensive factual inquiry. It found supportable findings of fact to be clearly erroneous and substituted its own interpretation of the record for that of the trial judge. That the panel erred is evidenced by three (3) simple facts.

A. *The trial judge's findings of fact are clearly supportable.*

The trial judge based his finding of no discrimination in the area of promotions primarily upon credible *and uncontroverted* statistical evidence presented by Dr. James Gwartney, a professor of economics from Florida State University specializing in labor economics, economics of discrimination and micro-economics. 519 F.Supp. at 142. His analysis of Union National Bank revealed the following facts. Black representation at *all levels* of the bank's workforce was and is either greater than or within an acceptable range of deviation from their expected representation when compared with their availability in the relevant labor market. 519 F.Supp. at 148-150. Education, seniority and work experience appear to be the determinant variables with regard to earnings levels. 519 F.Supp. at 163. And, most importantly, there has been no significant disparity

between the number of blacks in the bank's employ and the number of blacks receiving promotions. Defendant's Exhibit 34(a), 519 F.Supp. at 153. In fact, as the district court noted, " . . . in every year beginning in 1974, with the exception of 1978, blacks have been promoted at a far higher rate than would be expected. The difference in 1978 was insignificant." 519 F.Supp. at 153.

It is truly difficult to comprehend how the trial court's reliance on such persuasive evidence, particularly when viewed in the light most favorable to the defendant, can be construed to be so contrary to the weight of the evidence as to permit a finding that it was clearly erroneous.

B. *The panel's decision is clearly based upon an impermissible independent consideration of the totality of the circumstances found in the record.*

The Eighth Circuit panel's decision to reverse the trial judge came "[a]fter a careful review of the 6,000 page transcript and the 150 exhibits comprising [the] record on appeal." O. at 20. The rest of the opinion surely indicates that they did, indeed, make just such an independent, exhaustive review of the record. This extensive review, apparently conducted in an effort to ferret out those facts consistent with the panel's view of the case, was clearly violative of the express strictures of Rule 52(a) and the commands of this Court in *Pullman-Standard v. Swint*, ____ U.S. ____, 75 L.Ed.2d 66, 50 U.S.L.W. 4425 (1982). In *Swint*, precisely as in the instant case, the circuit court rejected a trial court's finding of no discrimination after an extensive review of the record and substitution of its own findings for those of the trial judge. This Court held that a finding of clear error is itself error if it is, " . . . the product of the court's independent consideration of the totality of the circumstances it found in the record." *Id.*, 72 L.Ed.2d at 81. That the appellant panel herein conducted just such an independent consideration becomes patently obvious when one reads consecutively the district court's opinion and then the panel's opinion. The panel consistently ignores probative, even compelling, evidence

supportive of the trial judge's findings while, at the same time, relying almost exclusively upon evidence specifically characterized as unreliable by the trial judge or upon evidence of limited probative value.

C. *The panel obviously substituted its own judgment for that of the trial court as to the weight to be given to particular evidence.*

In *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, ____ U.S. ____, 72 L.Ed.2d 606 (1982) this Court said that an appellate court may not set aside a district court's findings of fact as clearly erroneous merely because it would have given more or less weight to particular evidence than did the trial judge.

> Determining the weight and credibility of the evidence is the special province of the trier of fact.
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> * * *
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> An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent.' *United States v. Real Estate Board*, 339 U.S. 485, 94 L.Ed. 1007, 70 S.Ct. 711 (1950).

Id., 72 L.Ed.2d at 618.

The above-quoted language is applicable to the instant case. The district court based its finding of no discrimination in the area of promotion primarily upon statistical evidence showing no significant disparities in promotion ratios. The appellate panel, however, completely ignored this evidence, looked elsewhere in the record and relied exclusively on mere descriptive statistics—evidence the trial judge thought to be of little value.

What we have, then, is a disagreement between the trial judge and the appellate panel as to the relative weight to give different types of statistical evidence. The courts have recognized that the primary responsibility for evaluating statistical evidence and expert testimony rests with the trial court. *Inmates of Neb. Penal and Corr. Complex v. Greenholtz*, 567 F.2d 1368, 1376 (8th Cir. 1977), *cert. denied*, 439 U.S. 841 (1978); *Taylor v. Teletype*, *supra*, 648 F.2d at 1134; and *Hazelwood*, *supra*, 433 U.S. at 312. In this case the district judge shouldered his responsibility and, ultimately, found the statistical evidence adduced by the bank to be more persuasive. He should not be overturned merely because the appellate panel, were it free to do so, would afford relatively more weight to some statistics than to others.

Clearly, the appellate panel violated the express dictates of Rule 52(a). Appellate usurpation of duties properly delegated to the trial courts defeats the orderly and efficient adjudication of issues. This Court should exercise its supervisory powers here to properly limit the scope of appellate review.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that Certiorari be granted and the judgment of the Court of Appeals be reversed.

Dated, January 24, 1983.

Respectfully submitted,

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